

The Rule of Law, not the Rule of Politics

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On 24 September 2019, just two weeks after Parliament had been controversially prorogued by Prime Minister, Boris Johnson, the UK Supreme Court handed down a unanimous judgment holding that such prorogation was '[unlawful, null, and of no effect](#)'. Parliament was *not* and had *never* been prorogued. But this is not likely to be the end of such questioning of the fundamentals of the constitution and – in particular – the limits of executive power.

The Cherry/Miller (No. 2) Judgment

On the question of justiciability, the Court held that it was, by precedent and constitution, bound to determine the limits of the exercise of legal power. The Supreme Court recalled its centuries-old supervisory jurisdiction that it has had over the lawfulness of government acts. In determining the limits on the exercise of executive power, the court relied on two fundamental principles of parliamentary sovereignty and parliamentary accountability. Parliamentary sovereignty was compellingly interpreted to mean not just Acts of Parliament (as had been the orthodox understanding under Dicey) but the *actions* of Parliament. The Supreme Court confirmed that the role of Parliament – meeting, debating, legislating – was where the [heart of power](#) lies in the UK's (uncodified) constitution.

The Supreme Court held that the exercise of the power to prorogue without reasonable justification to frustrate or prevent Parliament from carrying out its constitutional functions as a legislature and as the body responsible for the supervision of the executive was unlawful. No reason, let alone a justifiable reason, had been submitted by government for such a long prorogation which by the degree of its detrimental constitutional effect was found to be unlawful. As the advice was held unlawful and outside the powers of the Prime Minister to give, it was quashed. The Court also quashed the Order in Council, otherwise simply understood as the exercise of the Queen's power, as likewise unlawful, null and of no effect – a 'blank piece of paper' [para 69]. Parliament was not prorogued, and it was for Parliament – not government – to call for its own return. The judgment was a robust statement, and rebuke, of the (ab)use of executive power to the detriment of the functions of Parliament.

Upholding the Rule of Law, not the Rule of Politics

The central argument of government was that the exercise of the prerogative power to prorogue was a political, not legal, question – and as such not justiciable. '[If Parliament had a problem with it, it was for Parliament to sort it out](#)'. The Supreme

Court's answer was that where such accountability to Parliament was not possible (as in the case of prorogation) – it was for the judiciary to step in and ensure its proper constitutional power was restored and to ensure that the executive did not abuse the use of theirs. The fact that ministers had political accountability to Parliament did not negate legal accountability to the courts: this judgment upheld the rule of law, not the rule of politics.

While this case will no doubt occupy UK public lawyers (and law students) for years to come, legal commentary has already highlighted important consequences of the judgment: for example, that the judgment [affirms](#) a Westminster, rather than 'Whitehall', view of the relationship between parliament and government by giving primacy to the former; and it resurrects legislation that had been [thought ended](#) with the session of Parliament. It has also significantly [impacted](#) on the understanding of the UK having a 'political constitution', and highlighted the [need for constitutional reform](#) particularly in the area of prerogative powers.

The judgment has also not been without (unfounded) criticism, however, as John Finnis [called](#) it 'unconstitutional' and an 'inept foray into high politics' relying on Art IX of the Bill of Rights 1689 which prohibited the questioning of parliamentary procedures. The Supreme Court had however aptly and authoritatively dismissed Art IX arguments as prorogation was not a protected proceeding: this clearly follows from principle – the intent of Art IX is to protect parliament *not* a prerogative power which suspends it. This is also [not a matter](#) of 'high politics': it is a basic but an essential question of the lawful limits of a legal power.

However inaccurately Finnis' opinions reflect UK public law, they are part of a wider [project](#) which deliberately seeks to present the courts as 'too political' and in doing so aims to diminish the judiciary's role in the protection of fundamental rights and principles. Leader of the House of Commons, Rees-Moog called the *Cherry/Miller (No. 2)* judgment a '[constitutional coup](#)', while the Prime Minister expressed his 'strong disagreement' with the unanimous judgment. For the conservative government, there is now a case for "judicial reform" (one may note in passing that the same notion has been used in Poland to [eradicate judicial independence](#)) to limit the power of the courts. The Prime Minister [is mooting](#) appointments to the Supreme Court to be made along partisan lines, as in the US. The absurdity of this argument must be highlighted: if judges are becoming 'too political', and so must be appointed by politicians, then this would only serve to *entrench* a political slant to the courts. Rather: the independence of the judiciary is a principle of the rule of law, not only because it ensures equality before the law, but because it roots the authority and legitimacy of the judiciary as *upholding the law* – not their own political preferences.

Will there be Miller (No. 3), and Miller (No. 4)?

Brexit is testing the boundaries of the separation of powers, requiring the Court to answer questions which have not arisen with such frequency and rarely with such urgency: basic questions of the meaning and scope of parliamentary sovereignty, the limitations on executive power, and the justiciability of political conventions. *Cherry/Miller (No. 2)* on the prerogative power of prorogation follows *Miller (No. 1)* in

requiring the judiciary to (again) enforce the primacy of Parliament over the powers of the executive, and (again) bind a convention which previously had not been at issue. The UK's 'political constitution' rested on conventions being conventionally applied without the need for legislative footing or judicial intervention. But, as the saying goes, a gentleman's agreement lasts so long as there are gentlemen – not an agreement.

But this is not likely to be the end of such questioning of the fundamentals of the constitution and – in particular – the limits of executive power. With some foresight, we may see the next *Miller-type* litigation arising as government continues to sound objection to the European Union (Withdrawal) No. 2 Act 2019 (also known as the "Benn-Burt Act") with incendiary and divisive political rhetoric of it being a '[surrender bill](#)', and vowing to '[test \[the Act\] to its limits](#)'. Some have even questioned the justiciability of the resignation of the Prime Minister in the event of a loss of a vote of no confidence under the Fixed Term Parliaments Act 2011. In the weeks before the (re)scheduled departure of the UK from the EU, following convention appears to be entirely unconventional.

Brexit can be described as a series of seismic shocks to the political, social, economic and legal systems of the UK. Writing only a week after the judgment, there seems as yet little time for reflection on whether this judgment – which resolutely places Parliament at the core of the British constitution and the courts in the position to defend and uphold the rule of law – will be (inaccurately) characterised as 'too political' and be used as ammunition to justify the undermining of judicial independence in a way akin to what has been happening in Hungary and Poland. It may alternatively be seen as a further step in towards entrenching a strong and robust concept of legal constitutionalism which upholds the separation of powers, the independence of the judiciary, and the rule of law.

